

it was not safe to drive at any speed at all unless and until the driver was aware of the exact position of the cyclist of whose presence in the immediate vicinity he was aware. On that, in my view, there is a clear *prima facie* case of negligence.

Having come to that conclusion the question then arises what this Court should do in view of the course taken at the trial by counsel for the defendants when he submitted that there was no case to answer.

It is a great pity that when this submission was made the advice of Goddard, L.J., (as he then was) in the case of *Parry v. Aluminium Corporation, Ltd.*⁽³⁾ was disregarded. His Lordship there observed that in cases of negligence if a Judge is asked to rule at the end of the plaintiff's case that the plaintiff had made out no case it is most desirable that he should put counsel for the defence to his election as to whether he wishes to call evidence for the defence and should refuse to give a ruling unless counsel elects to call no evidence. That statement as to the practice which should be followed in such circumstances has been approved again and again (*Laurie v. Raglan Building Co. Ltd.*, *supra*; *Yuill v. Yuill*⁽⁴⁾; *Storey v. Storey*⁽⁵⁾).

In the present case it is unfortunate that counsel who made the submission of no case to answer neglected to refresh the Judge's memory on this point. It is equally unfortunate, and even more surprising, that counsel for the plaintiff should also have failed in this regard. In the circumstances I think we have no option so far as the second defendant is concerned but to order a new trial. In my view, for which I have stated my reasons, the submission of no case to answer should have failed and the position would then have had to be considered in the light of the following passage from the judgment of Lord Greene M.R. in the case of *Yuill v. Yuill*, *supra*, (at p. 18):—

"The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission."

I would, then, set aside the judgment of the Court below so far as concerns the second defendant and would order a new trial. As regards the first defendant I would dismiss the appeal because the admission of the second defendant was not admissible as against him (see *Burr v. Ware Rural District Council*⁽⁶⁾).

A I think the proper order as to costs is that the costs of the appeal and the costs of the first trial should follow the event of the second trial. I say so because I think counsel on both sides were at fault at the trial for not giving the trial Judge the assistance he was entitled to expect. The first defendant should have by way of costs such amount (but only such amount) as the total costs have been increased by his being joined as a party, such amount not to include any apportionment of the general costs of the action or of the appeal.

C Hill J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

D Barakbah J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

Order accordingly.

Solicitors:—Chong Thutt Pitt & Co.; Rodyk & Davidson.

E SHERIFFA SHAIKHAH v. BAN HOE SENG & CO. LTD.

[O.C.J. (Ambrose J.) May 23, 1963]

[Singapore—Suit No. 624 of 1961]

F Power of Attorney—Forging of by agent—Execution of mortgage deed by person acting under forged power of attorney—Agent having no express or ostensible authority—Whether principal bound by act of agent.

G Deed—Deposit of title deeds by principal with agent—Agent mortgaging property using forged power of attorney—Whether principal bound by act of agent—Whether principal represented agent to have authority—Whether mortgagee relied on actual authority or on ostensible authority of agent—Whether power of attorney and mortgage deed were nullities.

Principal and Agent—Forgery of agent—Execution of deed by fraudulent agent—Subsequent conviction of agent—Whether principal bound by acts of agent—Whether agent acted under actual or ostensible authority.

H In 1952 the plaintiff purchased 4 houses and deposited the title deeds with a firm of commission and real estate agents for safe custody and appointed the firm to be her agents to collect rents, to pay rates and assessments and to attend to repairs. The partners of the firm were the plaintiff's husband and one S.A. In May 1960 S.A. had a power of attorney prepared in his favour and had it executed by a woman who was not the plaintiff. This power of attorney which purported to be executed by the plaintiff was registered on May 17, 1960: and on May 20, 1960 S.A. purporting to act under the registered power of attorney executed a mortgage deed in favour of the defendants who had no knowledge that the power of attorney and the mortgage were forged and took the mortgage in good faith. The said S.A. was subsequently convicted of dishonestly using as genuine a forged document.

The plaintiff brought an action to have the registered mortgage deed declared null and void. The defendant pleaded that (1) the plaintiff's conduct in placing the title deeds in the hands of S.A. and her husband amounted to a representation that they were her authorized agents in dealing with the properties and (2) S.A. being in possession of the title deeds was presumed to be able to deal with the properties as absolute owner thereof, and the plaintiff's failure to limit his authority in his dealings with the properties and her negligence in not keeping track of the title deeds misled the defendant in consequence of which it has suffered damage.

Held: (1) a principal is answerable for misrepresentation by any agent who is not a servant provided that such agent was acting within the scope of his authority, actual or ostensible. Principle in *Uxbridge Permanent Benefit Building Society v. Pickard*⁽²⁾ applied;

(2) S.A. had no actual authority to mortgage the plaintiff's properties;

(3) S.A. had no ostensible authority to mortgage the plaintiff's properties; the fact that S.A. was a real estate agent and had possession of the title deeds did not amount to a representation that he had authority to deal with the properties or give rise to such a presumption;

(4) the defendant relied on the actual authority contained in the forged power of attorney and not on the alleged ostensible authority of an estate agent in possession of title deeds;

(5) the power of attorney and the mortgage deed were nullities;

(6) the plaintiff was not negligent in not keeping track of the title deeds.

Cases referred to:—

(1) *Goh Choon Seng v. Lee Kim Soo* [1925] A.C. 550; 2 B.L.S.S. 437.

(2) *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 All E.R. 344.

ACTION.

N. A. Mallal for the plaintiff.

R. L. Eber (Miss Phyllis Tan with him) for the defendant.

Cur. Adv. Vult.

Ambrose J.: In this action the plaintiff asked the Court to declare null and void a registered mortgage deed, dated the 20th May, 1960, which purported to assign by way of mortgage in favour of the defendant four houses belonging to the plaintiff.

The mortgage deed was executed by one Syed Abdulrahman bin Abdullah Alsagoff, who purported to act as the plaintiff's attorney under a registered power of attorney dated the 16th May, 1960. The plaintiff pleaded that the power of attorney was never executed by her, and that she never authorized Syed Abdulrahman to mortgage or otherwise deal with her properties.

The following facts were proved. In 1952, the plaintiff purchased the lands and houses known as Nos. 19 and 21 Jeddah Street and Nos.

A 254 and 256 Kallang Road, Singapore. The assignments in favour of the plaintiff were duly registered in the Registry of Deeds, Singapore, in 1952. The above-mentioned Syed Abdulrahman and the plaintiff's husband at all material times carried on a partnership business as commission and real estate agents at No. 15 Klang Road, Singapore, under the style of Abdullah Alsagoff & Co. The plaintiff deposited the title deeds of the properties purchased by her with this firm for safe custody. And she appointed the firm to be her agents to collect rents, to pay rates and assessments, and to attend to repairs. In May, 1960, Syed Abdulrahman gave instructions to Mr. D. G. Osborne-Jones, an advocate and solicitor of the Supreme Court, for the preparation of a power of attorney for execution by the plaintiff. And Mr. Osborne-Jones proceeded to Syed Abdulrahman's house on the 16th May, 1960, to certify the execution of the power of attorney. There Syed Abdulrahman dishonestly introduced a woman named Aminah binte Mohamed Said to Mr. Osborne-Jones as the plaintiff. Aminah affixed her right thumbprint to the power of attorney in the presence of Mr. Osborne-Jones. In his certificate of execution, Mr. Osborne-Jones stated that he verily believed that woman to be the plaintiff from information given to him by two trustworthy and respectable persons namely, the witnesses who attested the execution of the power. This power of attorney was registered as No. 375/60 on the 17th May, 1960. It purported to give Syed Abdulrahman authority, *inter alia*, to mortgage the plaintiff's properties. On the 20th May, 1960, purporting to act under the registered power of attorney, Syed Abdulrahman executed the mortgage deed referred to above. As a result of this, on the 20th March, 1962, he was convicted of the offence of dishonestly using as genuine a forged document and sentenced to six years' imprisonment.

I found accordingly that the power of attorney and the mortgage deed were forgeries. It was not disputed that the defendant had no knowledge that they were forgeries and took the mortgage in good faith and for value.

It was pleaded in the defendant's counter-claim:—

(1) that the plaintiff's conduct in placing the title deeds of her properties in the hands of Syed Abdulrahman and her husband amounted to a representation that they were her authorized agents in dealing with the properties and

(2) that Syed Abdulrahman being in possession of the title deeds was presumed to be able to deal with the properties as absolute owner thereof, and the plaintiff's failure to limit his authority in his dealings with the properties and/or her negligence in not keeping track of the title deeds misled the defendant in consequence of which it has suffered damage.

Two cases were cited by counsel for the defendant. One was *Goh Choon Seng v. Lee Kim Soo*⁽¹⁾. That case is authority for the proposition that an employer is responsible for damage caused by the negligent act of his servant in carrying out work which he is employed to do, even if the act incidentally involves a trespass which the employer has not authorized. But that proposition seemed irrelevant to the facts of the present case. It was not alleged in the defendant's pleading that anyone was the plaintiff's servant: nor was such a fact proved. Nor was it alleged in the defendant's pleading what the negligence of the supposed servant was.

The second case cited by counsel for the defendant was *Uxbridge Permanent Benefit Building Society v. Pickard*.⁽²⁾ In that case the facts were these. The managing clerk of a solicitor's branch office was authorized by the solicitor on the solicitor's behalf to carry out conveyancing business, and to borrow money from building societies for clients secured by mortgages of real property. The plaintiffs were induced by the fraud of the clerk to advance money to a person alleged by the clerk to be a client of the branch on a mortgage of land. The fraud consisted of false misrepresentations and the production of a forged deed, which the clerk must have known to be a forged document. The plaintiffs were not the solicitor's clients; and the clerk's fraud involved the uttering of a forged document. Nevertheless, it was held that what the clerk did was within his ostensible authority, and that the solicitor was liable in damages for the fraud of his servant.

The principle to be extracted from the *Uxbridge* case is this. A master is liable for the fraud of his servant, if in committing the fraud the servant was engaged in a transaction which was within his ostensible authority, notwithstanding the fact that the persons defrauded were not the master's clients and that the servant's fraud involved the uttering of a forgery. In the *Uxbridge* case the solicitor's clerk was a servant. In the present case Syed Abdulrahman was a partner in a firm of estate agents, and, in my opinion, he was not a servant but an agent. But having given the matter the fullest consideration, I concede that the principle laid down in the *Uxbridge* case applies to an agent who is not a servant. I accept as correct the view expressed in *Street's "Law of Torts"*, 2nd edition, at page 388, that a principal is "answerable for misrepresentations by any agent who is not a servant provided that such agent was acting within the scope of his authority, actual or ostensible."

I had to consider whether Syed Abdulrahman had actual or ostensible authority to mortgage the plaintiff's properties. It was clear

A that he had no actual authority to do so. His actual authority was limited to collecting rents, paying rates and assessments, and attending to repairs. The next point I had to consider was this: did he have any ostensible authority to mortgage the plaintiff's properties? He was an estate agent and he had possession of the title deeds. I rejected the suggestion in the defendant's pleading that these two facts amounted to a representation that Syed Abdulrahman had authority to deal with the plaintiff's properties, and that they gave rise to such a presumption; for possession of title deeds might imply nothing more than a keeping for safe custody. I took the view that the authority given to estate agents by their principals varies. It seemed to me, therefore, that Syed Abdulrahman had no ostensible authority to mortgage the plaintiff's properties. In my judgment, anyone whom he approached for a loan on the security of a mortgage of the plaintiff's properties would be put on inquiry to ascertain whether or not he had actual authority to mortgage the properties. To my mind it appeared that the defendant relied on the actual authority contained in the forged power of attorney and not on the alleged ostensible authority of an estate agent in possession of title deeds.

A deed, the signature or seal to which is forged, is a nullity: see 11 *Halsbury's Laws of England*, 3rd edition, page 361, para. 587. It was not pleaded by the defendant that the plaintiff was estopped from setting up the forgery of the power of attorney. Nor was such an estoppel raised by counsel for the defendant in the course of his submissions. And I found no facts to support such an estoppel. The plaintiff did not admit or represent the power of attorney to be one executed by her; nor did she keep silent after discovery of the forgery. I held, therefore, that the power of attorney was a nullity. I held also that the mortgage deed was a nullity for the same reasons.

It was alleged in the defendant's pleading that the plaintiff's negligence in not keeping track of the title deeds misled the defendant, in consequence of which it suffered damage. I found no evidence of such negligence. Counsel for the plaintiff, acting on the assumption that a submission of estoppel by negligence would be made by counsel for the defendant, cited various authorities to show that such an estoppel could not arise in the circumstances of this case. No such submission was made on behalf of the defendant nor was such a plea raised, in my opinion, in the defendant's pleading. Estoppel by negligence is a type of estoppel in which the party in whose favour it operates is the victim of the fraud of some third person facilitated by a breach of duty of care on the part of the

party against whom it operates. Before anyone can be estopped by negligence, he must owe a duty to use due care towards the party misled, or towards the general public of which he is one. I found the plaintiff owed no duty of care to the defendant or to the general public when she deposited her title deeds with the firm of Abdullah Alsagoff & Co.

In the result, I declared the registered mortgage deed null and void, directed the Registrar of Deeds to cancel the registration of the mortgage, and ordered the defendant to hand over to the plaintiff all title deeds received by the defendant on the execution of the mortgage. I dismissed the counterclaim, and ordered the defendant to pay the plaintiff the costs of the claim and counterclaim on the higher scale.

Registered mortgage deed declared null and void. Counterclaim dismissed.

Solicitors:—Mallal & Namazie; Eber & Tan.

CHINA INSURANCE CO. LTD. v. NG SIAK YOW & ORS.

[A.C.J. (Gill J.) May 25, 1963]

[K.L.—Civil Appeal No. 423 of 1962]

Road Traffic—Insurance—Third Party risks—Notice of claim—Whether “notice of proceedings”—Road Traffic Ordinance, 1958, s.80.

The solicitors of the respondents, who had been injured in a road accident involving the owner who was insured with the appellant company, wrote a letter to the owner on June 16, 1958 claiming damages from him. In accordance with section 80 of the Road Traffic Ordinance, 1958 they on the same day sent a letter to the appellants, enclosing a copy of the letter sent to the owner, and also asking if liability was admitted. The letter to the owner read: “We are instructed to claim damages from you in respect of our client’s injuries. Please let us know if liability is admitted.” On October 14, 1961 the respondents obtained a judgment against the driver of the owner for the sum of \$600 and costs. On the appellants refusing to satisfy the judgment, the respondents brought the present proceedings pursuant to section 80 of the Road Traffic Ordinance for the recovery of that sum from the company. The appellants contended that they were not liable as no notice of proceedings were given to them pursuant to section 80 of the Ordinance. The learned Magistrate decided against the appellants. On appeal:

Held: the letter of June 16, 1958 was a notice of claim and not a notice of proceedings as required by section 80 of the Ordinance. *Ceylon Motor Insurance Association Ltd. v. P. P. Thambugala*⁽²⁾ considered.

Cases cited:—

(1) *Weldrick v. Essex and Suffolk Equitable Insurance Society Limited* (1950) 83 Ll.L.Rep. 91.

(2) *Ceylon Motor Insurance Association Ltd. v. P. P. Thambugala* [1953] 3 W.L.R. 486, P.C.

A MAGISTRATE’S CIVIL APPEAL.

Khoo Eng Chin for the appellants.

Alexander Lee for the respondents.

Cur. Adv. Vult.

B Gill J.: This is an appeal from a decision in a civil action in the Magistrate’s Court at Kuala Lumpur given on the 9th day of November, 1962, whereby judgment in the sum of \$600 and costs was entered against the appellants in favour of the respondents. The action was brought under the provisions of section 80 (1) of the Road Traffic Ordinance, 1958 (to which I shall henceforth refer as “the Ordinance”) to enforce a judgment of the Sessions Court, Kuala Lumpur in favour of the respondents on a claim for damages in respect of personal injuries sustained by the respondents in a road accident involving Motor Car B4230, which at the material time was driven by one Abdul Aziz bin Rajab with the permission and consent of the owner, Mohamed Nizamudin bin Abdullah.

The facts of the case are as follows. On 4th April, 1958 Motor Car B4230 ran into the respondents as they were standing on the grass verge on the right hand side of Ipoh Road, Kuala Lumpur, facing Kuala Lumpur, as a result of which they sustained personal injuries. On 16th June, 1958 the respondents’ solicitors wrote a letter to the owner of the car informing him that they were instructed to claim damages from him in respect of their clients’ injuries and asking him to let them know if liability was admitted. On the same day a letter was sent to the appellants as the insurers of the car, enclosing a copy of the letter sent to the owner and also asking them if liability was admitted. There was no reply either from the owner of the car or the appellants, nor were any further letters sent to the appellants. On 9th January, 1960 the respondents brought an action for damages for personal injuries in the Sessions Court at Kuala Lumpur, being Civil Action No. 69 of 1960, against Mohamed Nizamudin and Abdul Aziz as the owner and the driver respectively of the motor car. The Sessions Court on 14th October, 1961 gave judgment against the driver Abdul Aziz for a total sum of \$600 and costs, and apparently made no order against the owner Mohamed Nizamudin. The appellants as insurers either failed or refused to satisfy this judgment in compliance with the provisions of section 80 (1) of the Ordinance, whereupon the respondents filed an action against them in the Magistrate’s Court at Kuala Lumpur on 23rd March, 1962.

At the trial of the action in the Magistrate’s Court the parties chose to call no evidence and the case proceeded on arguments by learned